

EMPLOYEE SERVICE DETERMINATION

DR

This is the decision of the Railroad Retirement Board regarding whether the services performed by DR for the Iowa Interstate Railroad (IAIS) constitute employee service under the Railroad Retirement and Railroad Unemployment Insurance Acts. According to Board records, DR currently has no service months credited to him.

The coverage investigation in this case arose out of an audit of IAIS. The IAIS advised the Board's Bureau of Fiscal Operations, Division of Audit and Compliance, that the duties which DR performs for the IAIS were previously performed by a Goodwill Industries work program individual. DR himself began working at IAIS' facility through this program, but as of May 1997, DR has been providing services as a laborer directly to IAIS.

Pursuant to section 259.3 of the Board's regulations (20 C.F.R. 259.3), this matter is now before the Board for consideration.

According to information on file, DR is considered a part-time contract laborer. There is no written contract between DR and IAIS. Information on file indicates that DR's duties include taking the trash out; cleaning offices; cleaning sand out of the engines; cleaning the engine windows; spray washing the engines; cleaning the shop floors, pit, and around the pump; emptying and cleaning buckets, rolling up cords and hoses; and cleaning the toilets. DR began these duties in May 1997, and is paid on a semi-monthly basis, from invoices which he submits through the accounts payable department of IAIS. IAIS reports DR's compensation on Form 1099, as Miscellaneous Income.

DR works twenty hours per week, on Monday, Wednesday, Thursday and Friday, from 10:30 a.m. until 3:30 p.m. He performs his services at the Iowa City Locomotive Diesel Facility, which is IAIS property, and the same facility where IAIS employees work. According to information provided by DR, an IAIS supervisor determines the order or sequence of work to be done, and a supervisor at the IAIS roundhouse acts as supervisor over him. He is not given written instructions, but is given demonstrations as to what to do, as well as verbal guidance. His work is inspected daily for satisfactory completion. He is provided goggles and a helmet from IAIS.

The information supplied regarding DR's work activity must be evaluated to determine whether it constitutes self-employment or work as an employee. In making this evaluation, the characterization of DR's earnings for Federal tax purposes is not conclusive.

Section 1(b) of the Railroad Retirement Act and section 1(d) (1) of the Railroad Unemployment Insurance Act both define a covered employee as an individual in the service of an employer for compensation.

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Section 1(d) of the Railroad Retirement Act further defines an individual as "in the service of an employer" when:

(i)(A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services the rendition of which is integrated into the employer's operations; and

(ii) he renders such service for compensation * * *.

Section 1(e) of the Railroad Unemployment Insurance Act contains a definition of service substantially identical to the above, as do sections 3231(b) and 3231(d) of the Railroad Retirement Tax Act (26 U.S.C. §§ 3231(b) and (d)). While the regulations of the RRB generally restate this provision, it should be noted that section 203.3(b) thereof (20 CFR 203.3(b)) provides that the foregoing criteria apply irrespective of whether "the service is performed on a part-time basis * * *."

As the above definitions would indicate, the determination of whether or not an individual performs service as an employee of a covered employer is a fact-based decision that can only be made after full consideration of all relevant facts. In considering whether the control test in paragraph (A) is met, the Board will consider criteria that are derived from the commonly recognized tests of employee-independent contractor status developed in the common law. In addition to those factors, in considering whether paragraphs (B) and/or (C) apply to an individual, we consider whether the individual is integrated into the employer's operations. The criteria utilized in an employee service determination are applied on a case-by-case basis, giving due consideration to the presence or absence of each element in reaching an appropriate conclusion with no single element being controlling. Because the holding in this type of determination is completely dependent upon the particular facts involved, each holding is limited to that set of facts and will not be automatically applied to any other case.

Under federal laws numerous factors are involved in determining whether an individual is engaged in employee service and in the absence of judicial authority directly interpreting the employee service provisions of the Railroad Retirement Act these factors may be useful in application of those provisions. A few of these are particularly noteworthy in DR's case. An individual may not be self-employed where the employer furnishes without charge the supplies and premises for the work. See Henry v. United States, 452 F. Supp. 253, 255 (E.D. Tenn., 1978). Payment on an hourly basis rather than at a specified amount per job also indicates that the

individual is an employee. See Bonney Motor Express, Inc. v. United States, 206 F. Supp. 22, 26 (E.D. Va., 1962). An independent contractor offers his service to the general public rather than to a specific employer. See May Freight Service, Inc. v.

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United States, 462 F. Supp. 503, 507 (E.D. N.Y., 1978). Similarly, an independent contractor generally may substitute another individual to perform the contract work, while an employee must perform the work himself. Gilmore v. United States, 443 F. Supp. 91, 97 (D. Md., 1977).

Applying the foregoing criteria to the facts of this case, the Board finds that DR is performing his services as an employee of IAIS. He works on its premises, uses its supplies and equipment, at an hourly rate. He cannot arrange for another person to perform the work in his place. There is no evidence in the record that he held himself out as available to work for other parties. DR is supervised, as is evidenced by the fact that the order of completion of his assignments is determined by a supervisor and the fact his work is inspected daily.

Accordingly, it is the decision of the Board that DR's services for IAIS are being performed as an employee of IAIS pursuant to section 1(d)(1)(i)(A) of the Railroad Retirement Act and the corresponding section of the Railroad Unemployment Insurance Act. The Board therefore finds that that service is creditable under the Railroad Retirement and Railroad Unemployment Insurance Acts. Service may be credited in accordance with section 211.16 of the Board's regulations (20 CFR 211.16).

Original signed by:

Michael S. Schwartz

V. M. Speakman, Jr.

Jerome F. Kever